

UNITED STATES DISTRICT
DISTRICT OF MASSACHUSETTS

FRANCESCA GINO,)
Plaintiff,)
vs) No. 1:23-CV-11775-MJJ
PRESIDENT and FELLOWS OF HARVARD)
COLLEGE, LEIF NELSON, JOSEPH)
SIMONS, JOHN DOES 1-10, AND JANE)
DOES 1-10,)
Defendants.)

BEFORE THE HONORABLE MYONG J. JOUN
UNITED STATES DISTRICT JUDGE
MOTION HEARING

John Joseph Moakley United States Courthouse
Courtroom No. 20
One Courthouse Way
Boston, Massachusetts 02210

FRIDAY, MARCH 8, 2024
11:00 A.M.

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P R O C E E D I N G S

THE CLERK: All rise.

(The Honorable Court Entered.)

THE CLERK: United States District Court for the District of Massachusetts is now in session. The Honorable Myong J. Joun presiding. You may be seated.

Today is March 8, 2024. We're on the record in the matter of Gino V. Presidents and Fellows of Harvard College, et al. Case number is 23-CV-11775.

Will counsel please identify themselves for the record, starting with the plaintiff.

MS. SACKS: Julie Sacks for Plaintiff.

THE COURT: Good morning.

MS. T. DAVIS: Good morning, your Honor. Tara Davis for the plaintiff.

THE COURT: Good morning.

MS. FEDERICO: Good morning, your Honor. Regina Federico for the plaintiff.

THE COURT: Good morning.

MS. COOPER: Good morning, your Honor. Jenny Cooper on behalf of the defendants Harvard and Srikant Datar.

MS. E. DAVIS: Good morning, your Honor. Elana Davis on behalf of the defendants.

THE COURT: Good morning.

MR. BRAYLEY: Good morning. Douglas Brayley on behalf

1 of the Harvard Defendants.

2 THE COURT: Good morning.

3 MR. PYLE: Good morning, your Honor. Jeffrey Pyle for
4 Joseph Simmons, Leif Nelson, and Uri Simonsohn.

5 THE COURT: Good morning.

6 All right --

7 MS. TOWNSEND: Good morning -- excuse me, good
8 morning, your Honor. Katie Townsend and Rob Bertsche on behalf
9 of the Reporters Committee for Freedom of the Press and the New
10 Yorker Magazine.

11 THE COURT: Gotcha. All right.

12 Good morning, everyone. I am still a little bit under
13 the weather, so just excuse me if I'm coughing or I'll try to
14 keep that to a minimum.

15 So we're here on the various motions that have been
16 filed to seal or impound what the parties call the final
17 report. I didn't schedule the motions to dismiss for argument
18 today, in part because depending on the outcome of the decision
19 here today, I wanted the parties to take sometime to think
20 about whether the decision on this will change the -- sort of
21 the calculus on the motions to dismiss and to give the parties
22 an opportunity to either amend or append their filings on the
23 motion to dismiss. But today what I'll do is I'll hear from
24 the Harvard Defendants first and then I'll allow the Data
25 Colada defendants to add anything to that. And then I'll hear

1 from the media interveners and then I'll hear from the
2 plaintiff.

3 So, Ms. Cooper, are you arguing for Harvard?

4 MS. COOPER: I am, your Honor, yes.

5 THE COURT: All right.

6 So I know you make the argument in your brief that
7 because of the extensive references and discussion of the
8 report by Professor Gino, that the report is central to the
9 complaint. I'm having a little difficulty understanding
10 exactly why given what the claims are in the complaint and
11 given the standard on a motion to dismiss.

12 MS. COOPER: Okay.

13 THE COURT: Trying to understand why I have to rely on
14 the final report.

15 And the second thing is if you could sort of respond
16 to the case that Professor Gino cites, too, in their reply
17 brief. It was a -- it's called Doe v Harvard, and it was
18 decided by a different session of this Court.

19 MS. COOPER: Happy to, your Honor.

20 THE COURT: Thank you.

21 MS. COOPER: Sorry for the pause. I wasn't sure if
22 you had another question.

23 THE COURT: No, that's it.

24 MS. COOPER: Okay, thank you.

25 So, it sounds as though your Honor would like to start

1 with the issue that is not squarely within the motion to seal
2 but the question of whether the final report, which has not yet
3 been submitted to your Honor, can be considered or should be
4 considered in connection with the motion to dismiss; is that
5 right?

6 THE COURT: Right.

7 MS. COOPER: Okay.

8 So in terms of the complaint's reliance on it, and
9 perhaps it is helpful to start, your Honor, with the legal
10 framework that applies here, because in her arguments, in the
11 plaintiff's arguments, she takes the position that the final
12 report cannot be considered by your Honor because it's not a
13 written instrument. But the question of whether the final
14 report is a written instrument has nothing to do with whether
15 the Court can consider an exhibit -- the exhibit to the Harvard
16 Defendants' partial motion to dismiss. As I'm sure your Honor
17 is aware, on a motion to dismiss there are four types of
18 documents well established in the case law that courts can
19 consider in the context of a motion to dismiss and without
20 conversion to a motion for summary judgment. And three of
21 those four categories apply here.

22 That is, the documents, the final report. And when I
23 do refer to it, this is likely apparent, I am referring to the
24 multiple exhibits that also comprise the report. So there's
25 the report of the committee itself and then multiple documents

1 that are exhibits. Those documents are not of disputed
2 authenticity. They are central to the plaintiff's claims, and
3 it sounds like maybe that's the question that your Honor is
4 raising, and they are sufficiently referenced in the complaint.

5 The plaintiff, in her pleadings, does not address
6 these factors or the case law at all. And so to start with
7 some of the cases that she does cite, the Autila case that is
8 relied upon for the proposition that the report is not a
9 written instrument, is about whether an exhibit to a complaint,
10 not an extrinsic -- not a document extrinsic to the complaint
11 that is relied upon in a motion to dismiss. But an exhibit to
12 a complaint as part of the pleadings for purposes of a motion
13 to strike. It's an entirely separate inquiry than
14 consideration of extrinsic documents on a motion to dismiss.

15 In the Ironshore case, the First Circuit case that the
16 plaintiff also cites, ostensibly in support of the notion that
17 your Honor should not consider the final report in its
18 exhibits, that case plainly supports the conclusion that the
19 Court should consider the final reports and its exhibits in
20 adjudicating the motion to dismiss.

21 In Ironshore, the district court, considered a
22 contract among the parties to the litigation that was not
23 included in the complaint, but was appended to motions to
24 dismiss that both defendants in that case submitted to the
25 Court. The district court considered that contract and the

1 plaintiff appealed and argued that it was err for the district
2 court to have done so. And on appeal the First Circuit upheld
3 the district court's action noting that when a complaint's
4 factual allegations are expressly linked to a document, the
5 Court can review it on a motion to dismiss.

6 And if it's helpful for your Honor if I focus a bit on
7 the reasons that -- the manner in which the final report is
8 incorporated into the complaint and the reasons why
9 consideration substantively of the final report is appropriate
10 in context, I'd like to address those things.

11 So, claims that are subject to the partial motion to
12 dismiss, in particular the implied covenant claims, but also
13 the breach of contract claims, are essentially about fairness
14 and alleged procedural violations by Harvard, by the Harvard
15 Defendants. Violations of its own policies are alleged.
16 Harvard's position, in its motion to dismiss, is that the final
17 report and its exhibits, many of which the plaintiff cites, and
18 with your Honor's indulgence, I'm happy to go through the well
19 more than 60 paragraphs of the complaint that refer to it and
20 incorporate it, quote, characterize -- the complaint quotes and
21 characterizes the documents that are the -- that comprise the
22 final report on their face demonstrate the falsity of the
23 plaintiff's allegations. The Court, contrary to Plaintiff's
24 argument, the Harvard Defendants are not asking your Honor to
25 adopt the factual conclusions contained in the report. And I

1 think that's the primary issue that's raised in the Doe case,
2 that your Honor has asked about, which I will address. Harvard
3 is not asking the Court to adopt all of the factual
4 allegations, but rather is arguing and relies heavily on in its
5 motion to dismiss that the face of the documents themselves are
6 at odds with the plaintiff's allegations.

7 THE COURT: And so, basically what you're asking me to
8 do is weigh the evidence here. You're asking me to Hey, look,
9 look at the allegations in the complaint and compare it to
10 what's in the report, aren't you?

11 MS. COOPER: Yes, there is a request to look at the
12 allegations in the complaint and compare them to the statements
13 that are in the documents. But that's not necessarily weighing
14 the evidence. In multiple courts in this district, including,
15 including Judge Talwani in the Doe versus Harvard case, have
16 considered documents incorporated to the extent that these
17 documents are not for the truth of the matter asserted and not
18 in lieu of accepting the well-pleaded facts, but in looking at
19 the documents and making findings that are consistent with the
20 documents themselves. And I'm happy to speak to those cases.

21 Does your Honor have a question about the extent to
22 which the complaint incorporates --

23 THE COURT: No.

24 MS. COOPER: Okay. Because -- I won't address that
25 then. It would take sometime to go through all of those

1 paragraphs, but the references and incorporation are extensive.

2 The cases that I would direct your Honor to, that are
3 similar, and that are all in the First Circuit and actually
4 from this court. Multiple examples of this court considering
5 documents that are attached to a motion to dismiss, where just
6 like here, the authenticity is not disputed, and the documents,
7 just like here, are intertwined with the plaintiff's claims and
8 referred to extensively in the complaint.

9 A case cited in our papers is Doe versus Western New
10 England University. In that case the Court -- and this is a, a
11 claim brought by a former student. So somewhat, somewhat
12 similar circumstance. Proceedings were held under the
13 university's code of conduct and findings were made. A student
14 brought claims. And the Court considered a summary of the
15 complaint in its interviews. That's exactly what's included in
16 the final report, Plaintiff's own testimony that in her
17 complaint, you know, she describes, she asserts she wasn't
18 given a chance to respond. But many, many, many pages of
19 testimony and written submissions from her demonstrate on their
20 face without regard to the substance that she in fact
21 responded, for example.

22 The notices to the plaintiff that were given in that
23 case and e-mails exchanged with the plaintiff were all
24 considered in the context of a motion to dismiss because of
25 their incorporation into the complaint.

1 Somewhat similarly the Kader case and the U.S. versus
2 DePuy Orthopaedics case are also in our papers, your Honor. A
3 case that isn't in our papers, but is I think helpful is
4 another case from this court, from Judge Hillman, it's Bray
5 versus Worcester Polytech Institute. The cite for that case is
6 596 F. Supp. 3d 143, and it's a 2022 decision. In the Bray
7 case, the Court considered documents like those included in the
8 report, in the final report, university policies that were
9 incorporated by reference, and also detailed investigative
10 summaries and reports, not for the truth of the matter asserted
11 therein, but for the extent to which they conflicted with the
12 plaintiff's bare assertions. So the Court, Judge Hillman
13 considered notices of charges, e-mail correspondence with the
14 individual that was subject of the disciplinary proceedings, a
15 prehearing packet that was prepared for the hearing panel. So
16 evidence submitted by the parties to the proceedings, which
17 were incorporated and referred to in the complaint. And the
18 Court specifically noted that the Court did accept the
19 plaintiff's well-pleaded facts as true and did not consider the
20 documents for the truth of the matter asserted, but rather to
21 the extent that the allegations in the complaint conflicted
22 with the face of those documents, the Court, Judge Hillman,
23 made findings, factual findings, in accordance with the
24 documentary evidence. And similar to this case, not, not
25 completely analogous proceedings, but it was another student

1 discipline matter where internal university proceedings
2 occurred in a manner somewhat similar to the proceedings here.

3 And, your Honor, again, I mentioned it briefly, but
4 the Doe versus Harvard case that you asked about, Judge
5 Talwani's decision, it is absolutely true, as the plaintiff
6 notes in the papers, that Judge Talwani did not consider the
7 final report of the investigation committee in that case for
8 the truth of the statements set forth therein, but for the
9 limited purpose of determining whether the plaintiff's
10 citations to the final report in the complaint conflicted with
11 the actual text of the documents. And there's, there's not
12 extensive discussion in the opinion about exactly what Judge
13 Talwani considered and what she didn't. But there's one
14 example in a footnote where the allegation in the complaint --
15 and I can pull the case to make sure I have this exactly
16 correct. But where there's an allegation in the complaint that
17 characterizes what was submitted by a party in the report. And
18 Judge Talwani notes in her footnote that the characterization
19 was overly broad because the face of the document was clear
20 that there was a representation, you know, in a more narrow
21 regard than the complaint alleged. And she considered the
22 final report itself in that type of situation where there was
23 simply a conflict on the face of the document, the exhibit,
24 with the nature of the allegation or the characterization of it
25 that we've made. And the complaint here is full of

1 characterization after characterization of the burden of proof
2 that was applied, of alleged violations of the policies that
3 occurred, of the nature of testimony that was given by
4 individuals, of the facts that allegedly the committee in its
5 report utterly failed to consider any evidence that was
6 submitted, and that in itself constituted an unfair process or
7 a sham investigation. When without even considering the truth
8 of the matter your Honor can read the documents, which are
9 extensive, it's true -- it's true that it's extensive -- can
10 read the documents, the report itself and its exhibits, and see
11 the very testimony that is characterized. See the
12 opportunities that were given to the plaintiff to respond. See
13 the fact that the committee, in its own internal procedures at
14 the university, which your Honor I'm sure is aware entitled to
15 some level of deference by the Court, not for the substance of
16 what they found, but where the committee articulated the
17 process that it was going through, evaluated evidence that was
18 submitted completely contrary to the bald assertions that are
19 made in the complaint that they failed to do so and they didn't
20 do that at all. And, again, just to circle back to the Doe
21 case, the Harvard case that you asked about, the action that
22 Judge Talwani took in that case I think is completely
23 consistent with what the Harvard Defendants are asking your
24 Honor to do in this case.

25 THE COURT: Do you say that the plaintiff relies on

1 the report as a basis for a liability on any of the claims?

2 MS. COOPER: I do believe that --

3 THE COURT: Which claims?

4 MS. COOPER: That the complaint -- so the breach of
5 contract claims and the applied covenant claims, they all
6 relate to the process itself and her characterizations of what
7 procedures were and were not followed, of whether evidence was
8 or was not considered. Whether she was or was not given notice
9 in a timely way. Whether she was or was not permitted to
10 respond. The final report is essentially a record --

11 THE COURT: So these would be the policy that was in
12 place, I can sort of look at the report --

13 MS. COOPER: That's right. Vis-à-vis --

14 THE COURT: Okay.

15 MS. COOPER: Vis-a-vis the policy that's in place and
16 the actions that the committee took. She characterizes all of
17 those things in her complaint.

18 And the final report, if I may, your Honor, in
19 addition to containing conclusions, right, which we're not
20 asking your Honor to adopt or assess, is literally a record of
21 everything that occurred. That that's what the final report
22 contained. So, it demonstrates adherence to policies. It
23 demonstrates notice, the exact dates of the notices, right,
24 that she says she wasn't given. It demonstrates the acceptance
25 of evidence and the assessment of it. All things that she, in

1 her claims, relies upon to, you know, in her claims that
2 Harvard is liable to her for failure to meet its obligations.

3 THE COURT: All right, thank you.

4 MS. COOPER: Thank you.

5 THE COURT: Mr. Pyle.

6 MS. COOPER: And I'm so sorry, but I assume that your
7 Honor's asked for the things that you would like to hear from
8 me from. I certainly have argument on the sealing issue, but
9 is it right that you just wanted me to address those questions?

10 THE COURT: I don't think I have -- I'm not wrestling
11 with that sealing issue --

12 MS. COOPER: Okay.

13 THE COURT: -- like, what portion to seal. I'll
14 address that with the plaintiffs.

15 MS. COOPER: Okay.

16 Thank you, your Honor.

17 MR. PYLE: Good morning, your Honor.

18 I would start off by suggesting that this report is
19 already a judicial record, because Harvard has referenced it
20 extensively in its own motion to dismiss. And so I would
21 suggest, your Honor, that the question of whether or not to
22 consider the report in the context of the motion to dismiss is
23 not currently before you, because what's before you today is
24 questions on whether the report will be filed with the Court
25 with certain -- with certain redactions or whether the report

1 will be filed entirely under seal as the plaintiff is
2 requesting.

3 THE COURT: But even if I choose not to rely on it, it
4 becomes -- it's already a judicial document?

5 MR. PYLE: Yes, your Honor, because Harvard has cited
6 to it extensively in its own motion to dismiss, and it is
7 submitted to the Court for permissible purposes, I would
8 suggest, under the motion to dismiss standard. It is a
9 judicial document because it is part of the Harvard motion.
10 The only reason it's not currently filed with the Court is the
11 local rule, Rule 7.2 that says before you file a document even
12 partially under seal, you have to seek permission for certain
13 redactions. And then the Court considers the question of the
14 redactions or the -- or taking it under seal. That is what is
15 before you today, I submit, and not the question of whether to
16 rely on the report in the context of the motion to dismiss.
17 That you can decide when we have hearing on the motion to
18 dismiss, and you can consider the report.

19 But turning, you know, briefly to that question, it is
20 a cardinal rule under motions to dismiss that when an
21 allegation about a document is contradicted by the document, it
22 is the document that controls and not the allegation about the
23 document. And Professor Gino has made lots of
24 characterizations about the content of this final report in her
25 complaint. I understand Harvard's position to be that the

1 actual final report contradicts those allegations literally
2 about what the document says, not about the truth or falsity of
3 anything in the document. And that is -- the same is true for
4 the Data Colada defendants that I represent. At paragraph 269
5 of the amended complaint, Professor Gino premises part of her
6 defamation complaint. The falsity of a statement that my
7 clients made, she alleges, is shown by the Harvard report. My
8 client said Harvard presumably vetted this question when it
9 found her responsible. She says, no, they didn't. That's a
10 false statement of fact as shown by the Harvard report.
11 Harvard takes the opposite view and said, Yes, we actually find
12 this thing. And so it is not a question of did Professor Gino
13 commit, you know, academic or scientific misconduct that the
14 Court would be considering on the motion to dismiss. It is
15 what did the final report find? And do Professor Gino's
16 allegations plausibly state a claim for relief based on her
17 allegations concerning the content of the final report,
18 including her claim of defamation against the Data Colada
19 defendants?

20 On the question of the motion to seal, which is
21 properly before you today, clearly this is a judicial document
22 to which there is a strong First Amendment and common law
23 presumption of access. This document goes directly to issues
24 in a dispositive motion. Only overriding reasons can justify
25 the redaction or wholesale sealing of a judicial record. And

1 Professor Gino has not come close to making that kind of
2 showing.

3 Also, under the standard, any redaction has to be --
4 or sealing has to be narrowly tailored to the overriding
5 interest that's identified. Professor Gino's overriding
6 interest is her effort to try to control the narrative about
7 what this final report found and the false -- and the faults
8 behind the final report. That is not an overriding interest.
9 No court has ever held that a complaint that a Plaintiff's
10 desire to control the narrative of her case is an overriding
11 interest. The Courts also hold that reputation of a Plaintiff
12 is not an overriding interest. There's lots of embarrassing
13 things that come out in court proceedings as we see every day
14 on the news. That is the nature of a public court proceeding.
15 My clients didn't ask to be sued by Professor Gino. Professor
16 Gino is the one who decided to sue. She's the one who decided
17 to incorporate all these allegations about the complaint, about
18 their final report into her complaint, and make lots of public
19 statements, including on her personal website, about how: If
20 you read the report, ladies and gentlemen of the public, you
21 will see plainly on the face of the report how false and faulty
22 the analysis is. But now she comes before the Court and says,
23 Oh, no, no, no, the public shouldn't see that report because it
24 would hurt my reputation. The conflict between those two
25 positions is apparent on the record. It shows there is no

1 overriding interest in sealing this record. The press, the
2 public, and my clients, who have not seen this final report,
3 have a right of access to this under the First Amendment. So
4 the motion to seal by Professor Gino should be denied.

5 Thank you, your Honor.

6 THE COURT: All right.

7 MS. TOWNSEND: Thank you, your Honor. Just a few
8 things that I would add. It think the arguments that you've
9 heard from the parties thus far really illustrate precisely why
10 my clients, members of the press, members of the public,
11 including the New Yorker who has covered this dispute
12 extensively and would like to continue to cover this dispute,
13 why we're here to begin with. The final report is from
14 certainly the outsider's perspective, and I think these
15 arguments highlight really central to understanding this
16 litigation, to monitoring what an understanding what
17 allegations are being made by the plaintiff. I think as
18 counsel for the Harvard Defendants indicated, and we indicate
19 in our briefing, more than 60 paragraphs of the complaint are
20 referring to, quoting, citing allegations that are being made
21 or statements made in the final report, and the Harvard
22 Defendants are arguing in turn that those are
23 mischaracterizations. It's very difficult, if not impossible,
24 for members of the public to understand that dispute, to really
25 understand the dispute and ultimately this court's resolution

1 of that dispute without access to that really key exhibit.

2 I note just a couple of things to follow counsel for
3 the Data Colada defendants, the First Circuit has expressly
4 rejected an approach to public access that would turn on
5 whether or not a document is actually considered by a court in
6 resolution, with respect to resolving a motion. So I would
7 point the Court to United States against Kravetz, which is a
8 case that I think is cited throughout all the parties' briefing
9 in this issue. It really underscores the point that my
10 colleague was making, that this is in fact a judicial record.
11 It's already a judicial record. And the only question before
12 the Court on the Harvard Defendants' Rule 7.2 motion is to what
13 extent that -- whether and to what extent that document will be
14 redacted when it's placed on the public docket.

15 I recognize your Honor said you were not really
16 wrestling with the sealing issue, which is the primary reason
17 the media intervenors are here. I'm happy to address that
18 further if your Honor has questions. I will just say I think
19 all the parties say Plaintiff agree that this document should
20 be public to at least some extent immediately. Placed on the
21 public docket immediately. The dispute and where media
22 intervenors disagree with the Harvard Defendants is on this
23 question of third-party privacy rights. I will underscore
24 that, I think, FTC against Standard Financial Management, which
25 I think, again, is cited throughout the briefing to your Honor,

1 is really the North Star here. The Harvard Defendants bear the
2 burden of persuasion and proof to demonstrate that the common
3 law, setting aside the First Amendment -- the common law
4 presumption of access has been overcome by compelling reasons.
5 Those third-party privacy interests may, in appropriate
6 circumstances, be a basis for redaction. Inappropriate
7 circumstances is the key phrase. We don't have those here. I
8 don't think the Harvard Defendants have met their burden either
9 from an evidentiary perspective. There are no Affidavits that
10 have been submitted. No, no real meaningful factual basis to
11 demonstrate either that these individuals' names are the kind
12 of private, sensitive information that has traditionally been
13 sealed or found, can be the subject of redaction, nor that any
14 harm would result from disclosure. And that is their burden to
15 bear. And so I would direct the Court to FTC against Standard
16 Financial Management, which I think on the sealing issue
17 controls and makes clear that the names of the third-party
18 witnesses who participated in the Harvard's investigation into
19 Plaintiff's alleged misconduct or data research misconduct,
20 that those names cannot be, cannot be redacted.

21 Thank you, your Honor.

22 THE COURT: All right.

23 Ms. Sacks.

24 MS. SACKS: Thank you, your Honor. May I?

25 THE COURT: Yes.

1 MS. SACKS: You have questions for me you'd like me to
2 address?

3 THE COURT: Well, there's -- it's two things that come
4 to mind immediately, which is, you know, just heard everyone
5 say how extensively Professor Gino has referenced and discussed
6 the report in the complaint. That's one.

7 The two is how publicly she has discussed the final
8 report to Attorney Pyle's point.

9 To the New Yorker she says, Look, if you read the
10 report, you will see that, you know, it's riddled with errors.
11 But now you're saying, Oh, you know, you can't read the report.

12 And I guess there's a third thing, which is, on the
13 one hand you're saying you shouldn't consider -- that I
14 shouldn't consider this report at all. But if I do consider
15 it, that I should impound the report in its entirety, which
16 sort of -- it's contradictory to, again, the extensive
17 references and open discussion of the report.

18 MS. SACKS: Okay. So I'll address these in the order
19 you've given me.

20 In terms of referencing the report in the complaint,
21 courts in our circuit and courts in other circuits distinguish
22 between referencing a report, or often it's an investigation
23 report in employment context to disparage or impugn the
24 contents of the report versus relying on a document for her
25 claims. Professor Gino in no way, shape, or form relies on the

1 content and the conclusions and the multiple hearsay statements
2 in that report for her claims. Rather, what she -- what she
3 disputes is the process itself. And the report, the
4 self-serving statements in an investigative report conducted by
5 an employer don't tell us about the process. For instance, we
6 don't know -- the report is not going to tell us what universe
7 of documents were examined. It's not going to explain the
8 motivations for the decisions at hand -- that they made. It's
9 not going to get to the factual reasons why certain choices
10 were made and how they arrived at conclusions. We don't know.
11 The investigative report won't speak to "Did the committee
12 follow best practices?" So, to the extent that it's referenced
13 in the report, the cases are very clear that it's impermissible
14 when a Plaintiff references a document to impune the contents
15 that it should be considered incorporated by reference.

16 And I would like to say with respect to this idea,
17 that I don't think Plaintiff in her memoranda indicated that an
18 exhibit to a motion to dismiss is, is -- shouldn't be
19 incorporated. For instance, in this case Plaintiff attached
20 certain documents, like Data Colada's blog post and the policy
21 statements that represent -- that form the employment contract,
22 because they're legally operative documents. And ultimately
23 those claims are -- I mean, sorry. Those documents, the
24 content of those documents are what Plaintiff's claim rest on.
25 When Data Colada's counsel attached to the motion to dismiss

1 the full expanded blog post, the text which were missing in
2 Plaintiff's complaint, there were links within those blog posts
3 that expanded the text, there was no objection because that's
4 fair. Because, your Honor, the Court should look consider the
5 entirety of the speech to determine Plaintiff's defamation
6 claims.

7 I would say also in the Doe -- the case decided by
8 Judge Talwani in this court, Doe V. University Defendants, it's
9 very important to recognize the parties in that case stipulated
10 to filing the investigation report under seal. The parties
11 agreed. And the dispute was how to use the report. Judge
12 Talwani referenced a Dartmouth case with approval, in which,
13 just like Harvard, Dartmouth attached to its motion to dismiss
14 a copy of an investigative report. And I'd like to -- that
15 case was Doe V. Trustees of Dartmouth College. And in that
16 case, let's see, it's a 2018 Westlaw, 204-8 -- sorry, 204-8,
17 384 at page 1, District of New Hampshire, May 2, 2018. The
18 Court made clear that just, just like Harvard in this case --

19 THE COURT: Is that the case where the pleading was
20 struck because --

21 MS. SACKS: It was. It was.

22 THE COURT: Yeah, I know it.

23 Okay, go ahead.

24 MS. SACKS: So, same argument, that it was central to
25 the case, and the Court held it's impermissible because it's

1 not central to the claims. What it was, was the university
2 just wanted to refute and inject its own narrative into the
3 well-pleaded complaint. And that's improper at this stage.

4 THE COURT: I'm not sure that that's entirely what the
5 defendants are arguing here. They're not asking me to accept
6 the report for the truth of the matter that's asserted in
7 there. What they're asking me to do is this is what the
8 plaintiff says in the complaint, and that's demonstrably false.
9 Not about the investigation or the substance of the
10 investigation, but let's say there's an allegation that she was
11 not afforded an opportunity to respond, for example, and
12 clearly in the investigative report there is -- and you don't
13 challenge, you know, the authenticity of the report. So I look
14 at the report and it says, you know, whatever. Professor Gino
15 was given this opportunity, that opportunity, or -- and I can
16 just look at it from the report. And I'm not accepting the
17 substance of the investigation, whether the -- but on that
18 point as to whether she was given an opportunity to respond, if
19 it shows in the report that she was, can't I make a finding
20 that I should just ignore this part of the allegation in the
21 complaint in order for me to decide the motion to dismiss?

22 MS. SACKS: Well, addressing the specific question
23 before I get to the larger policy reason --

24 THE COURT: Okay.

25 MS. SACKS: -- that I think that's not a good tact.

1 Is that, no, it really won't, because you can't prove a
2 negative, right? So the investigators and the committee and --
3 that report will not tell you what wasn't asked. What
4 exculpatory evidence wasn't followed up on. What leads weren't
5 followed up on. The report will not tell us why or why not
6 collaborators and RAs with whom Professor Gino worked had their
7 devices examined or not. The report is not -- the report
8 itself needs to be tested. By itself, it cannot, it cannot
9 explain. It's not a document that can explain itself, whether
10 or not best practices were followed, because to do that, we
11 would need to know what was the actually, the underlying
12 documents that were looked at? For instance, one of the
13 allegations in the complaint is that Professor Gino wasn't
14 provided the underlying documents that were allegedly examined
15 by Nate Stone. Without those underlying documents and only the
16 conclusions whether they're -- that we believe are
17 non-probative, it's ultimately not helpful. And it's also
18 potentially very damaging to a -- an employee like Professor
19 Gino who alleges that the report is part of the -- not the
20 report, but the process and the actions taken subsequent to
21 that process are part of the wrongs and why she's bringing her
22 lawsuit. This would be a very poor precedent in terms of
23 policy if every time an employee, like Professor Gino, brings a
24 claim for discrimination, she or he can just expect that the
25 employer will say Oh, you're suing us? We're putting this

1 report and we're attaching it to our motion to dismiss. When
2 the report itself should not be presumed to be a document that
3 will share, that will disclose whether or not the process
4 itself was flawed. And that's what I think is the problem --

5 THE COURT: Well, let me ask you this just to clear
6 things up a little bit. Let's just give you a complete
7 hypothetical. Let's say in the complaint a plaintiff alleges
8 that John Doe was not interviewed.

9 MS. SACKS: Uh-huh.

10 THE COURT: But the investigative report says -- shows
11 that he was interviewed. On that point, can't I rely on the
12 report to make the decision that in considering the motion to
13 dismiss, that I will not consider that allegation in the
14 complaint? Because it's -- obviously whether it was a typo or
15 something, it's just not true.

16 MS. SACKS: I think that's fair. I think something --
17 sure, that that is fair. But I think there are, there's also
18 information that the report won't convey as to whether or
19 not -- and very important, for instance, whether or not devices
20 and possessions of people who collaborated with Professor Gino
21 were examined. It will not speak to whether or not -- why
22 decisions were made in terms of what documents were given to
23 the -- to a forensics consulting company, Nate Stone. It won't
24 make clear whether or not documents were cherry picked. So
25 there's a lot of information about the process that won't be

1 answered. And so what happens --

2 THE COURT: So that may be all true, but it seems to
3 me that then, you're at least in agreement with Attorney Cooper
4 that I can compare the allegations in the complaint on the one
5 hand with the final report on the other just to see whether the
6 factual allegations do not contradict the report.

7 MS. SACKS: I don't agree with that, your Honor. I
8 think it would be highly prejudicial. Because the report
9 itself is filled with hearsay, and it's --

10 THE COURT: Yeah, I'm not accepting what's in the
11 report for, you know, the truth. I'm just simply looking at,
12 you know, like a simple fact. Like, John Doe was interviewed
13 or was not interviewed.

14 MS. SACKS: I think at this stage it would not be
15 appropriate, because it's premature. Because under our federal
16 rules we have different hurdles for a plaintiff to --

17 THE COURT: So are you suggesting, then, that even if
18 the allegation in a complaint is false, that I have to
19 consider -- I have to accept it as true for the purpose of
20 deciding a motion to dismiss?

21 MS. SACKS: Until Harvard files an answer with a
22 denial, I think that would be -- yes, I think that's, a
23 complaint, a well-pleaded complaint if the allegations are
24 presumed true on a motion for 12(b)(6). The filing of the
25 report is not an answer to the allegations. It's essentially a

1 document that the -- Harvard is asking you to weigh as evidence
2 to rebut the -- and inject into the complaint. It's factual
3 content that's disputed. And it's inappropriate at this stage.
4 It's appropriate at the -- on a motion for summary judgment.
5 But right now the document isn't a judicial record. It hasn't
6 even been filed yet. It also is not relevant to this court's
7 adjudication of whether the complaint is sufficient and viable.
8 It's -- the whole purpose of the doctrine of public access is
9 to help the public understand the Court's process, and to
10 monitor the courts. It's traditionally been for criminal law
11 cases, but it's in civil cases, too. But Ms. Townsend said, I
12 heard her argue, that the complaints needed -- but we want to
13 cover this story basically, and we want to understand the
14 dispute. But understanding what was said or not said in the
15 report is not about understanding the judicial process.

16 THE COURT: Let's move on to your argument that if I
17 do consider it, that I should impound the entire document.

18 MS. SACKS: I'm sorry, your Honor.

19 THE COURT: Your argument that if I do rely on the
20 report, that I should impound the entire report.

21 MS. SACKS: At this stage it would be -- yes, we think
22 it would be prejudicial to -- for you to consider it at this
23 stage. However, yes, I think it -- at this stage it's, it's
24 not a judicial record. It is -- hasn't yet been filed. It is
25 not relevant to the Court's process. It sets a terrible policy

1 of having any employee in a case like this --

2 THE COURT: I think all of those answers are -- I mean
3 all of those questions are answered once I make the decision
4 that I'm going to rely on it, right? So if I am going to rely
5 on it, then what is your argument for impounding the whole
6 document?

7 MS. SACKS: Because presuming the allegations in the
8 complaint are true, as the Court must, under the rules at this
9 stage, she has been defamed. She's been discriminated against.
10 She's brought claims for breach of contract. Her claims don't
11 rely on the substance of the report. Impoundment at this
12 point, when you have documents that are essentially accusations
13 against Professor Gino for research misconduct, she's already
14 been damaged. She cannot find a job. She has been the subject
15 of a media firestorm. To publish this on the public document,
16 this court would essentially be assisting in the perpetuation
17 of the damage. We know that the, the document isn't relevant.
18 It is not relevant to Harvard's motion to dismiss. It is not
19 relevant to the adjudication of the complaint. The desire to
20 file the document on the public docket it's, it's frankly
21 gratuitous and unnecessary.

22 The U.S. Supreme Court has held, and the First Circuit
23 has held, that every court -- and I'm citing from Nixon V
24 Warner Commissions, Inc., 435, U.S. 589, (1978). Every court
25 has supervisory power over its own records and files and access

1 has been denied -- public access to a judicial record, if we
2 assume this to be a judicial record. Access has been denied
3 where court files might have become a vehicle for improper
4 purposes. For example, to ensure that its records are not used
5 to gratify private spite or promote public scandal or to serve
6 as reservoirs of libelous statements for press consumption.
7 And that's really what's happened here.

8 THE COURT: All right, thank you.

9 I don't think it's going to take long for me to decide
10 this issue. Do we want to schedule a date to hear the actual
11 motions to dismiss at some point now or do you want me to issue
12 the decision on this first before you guys pick a date?

13 MS. COOPER: Your Honor, I have no objection to
14 looking to schedule the date for that hearing at this time. I
15 was going to ask if I might respond to a couple of things that
16 Plaintiff's counsel raised. But that's obviously up to your
17 Honor's discretion.

18 THE COURT: Sure, if it's short.

19 MS. COOPER: Just briefly, there -- and I appreciate,
20 and I'm going to try not to rehash things that I said earlier,
21 your Honor. But a few things.

22 One is that there seems to be developing and equating
23 consideration of the final report to whether it can be filed at
24 all. We have relied on it. We cite to it extensively. We do
25 believe it's relevant to the -- to the merits of the motion to

1 dismiss for the reasons that I have articulated. And just to
2 say it, there's well-developed authority that accepting the
3 allegations in a well-pleaded complaint does not mean accepting
4 bald assertions or implausible ones. And that's exactly what
5 we have spelled out in the motion to dismiss and that I have
6 discussed with your Honor today. There are specific
7 allegations and characterizations of the committee's work.
8 While I'm not -- I don't even know that it is relevant
9 specifically to the motion to dismiss, but Ms. Sacks was
10 outlining the report won't tell you what questions they didn't
11 ask. Yes, it does. There are transcripts. That's exactly
12 what's there. So to the extent there's an allegation she
13 didn't get a chance to respond and that violated policy and it
14 was unfair, this is what the record shows. There's a
15 transcript of every question she was asked and the answer she
16 gave. And everything that she and her lawyers submitted in
17 response to these allegations that she's arguing now, she needs
18 a chance to respond to. Well, she filed her complaint when she
19 chose to and she made the claims that she made, and they
20 specifically are characterizing and quoting the very things
21 that are in the documents that she's chosen not to attach. It
22 seems to be the -- the position seems to be she should say
23 whatever she wants publicly, including these documents
24 exonerate me. Just literally a quote from her website. These
25 documents show errors. These documents exonerate me. The

1 witnesses gave testimony that exonerates me. That's all in the
2 record. That's all in the final report that has been
3 submitted. And the question is not whether Harvard can file
4 it. As your Honor is aware, it's just the local rules that say
5 if you want to file something under seal, don't give it to the
6 Court until the Court decides. It is a judicial record. I
7 agree with Mr. Pyle. We have already relied on it. And I
8 don't believe -- and your Honor should review it to decide the
9 extent to which it should consider the report and for what
10 purposes. And the case law is not as Ms. Sacks characterized
11 that a court cannot consider a document that a complaint refers
12 to for purposes of impugning the document. There are cases
13 that say the Court should not conclude that the plaintiff is
14 adopting all of the facts that are asserted. That's very
15 different from considering the document. These things are not
16 the same.

17 Again, I wanted to separate the issue of whether
18 Harvard can file its own documents.

19 THE COURT: I think I got it.

20 MS. COOPER: As compared to whether your Honor can
21 consider it.

22 And just -- oh, the -- I'm not -- while she cites
23 cases that says -- well, the plaintiff cites cases that say,
24 you know, a court -- there may not be public access, and, you
25 know, the intervenors and Mr. Pyle may want to speak more to

1 this than Harvard would, but that in determining or in
2 balancing the public's right of access with a party's privacy
3 interests -- and I would be happy to speak to the third-party
4 privacy interest, if that's of interest to your Honor. We
5 brief it as well. But there's ample authority.

6 THE COURT: I'm good on that, yeah.

7 MS. COOPER: The cases that she cites do not -- she
8 doesn't actually make a claim that there's an improper purpose
9 here, right? Nor are the reputational interests that are
10 referred to in some of those cases at issue in the same way
11 here, because those cases really, for example, consider
12 criminal allegations that have been made about third parties in
13 a judicial officer's report. That's the Amadeo case, for
14 example. The Pasco case that talks about, you know, publicity
15 or possibly an improper purpose, what's at issue of being
16 sealed in that case, first of all, the parties agreed to have
17 it sealed. Second of all, what's at issue are descriptions of
18 documents that were obtained by the government at the U.S.
19 border when it searched, with no warrant and no reasonable
20 cause, the individual's computer. And what the Court says is,
21 the descriptions of those photographs are not the subject of
22 any motion. They don't relate to the party's substantive
23 rights, and the public has a low interest in seeing them and
24 I'm deciding that they can be sealed. That has nothing to do
25 -- here the complaint is the place that the documents are

1 spoken about extensively. And it is not to further tarnish her
2 reputation. The fact that Harvard determined that she engaged
3 in research misconduct is already known. That fact is known.
4 Harvard isn't publicizing it. She filed a lawsuit about it.
5 She created a website about it. Okay? And she doesn't
6 identify -- I'm not taking the position, and I don't think
7 anyone would, that that fact would not be harmful to someone
8 professionally. However, what they do not do is identify
9 anything in the report that uniquely worsens the situation or
10 invokes a particular privacy interest. Right? The conclusion
11 is already out there. And frankly, what she has said is
12 Harvard's conclusion is bogus, and if you look at their work,
13 you'll see that it is. But now she's saying nobody should get
14 to look at their work.

15 THE COURT: Understand. Thanks.

16 MS. COOPER: Thank you, your Honor.

17 MS. SACKS: May I just --

18 THE COURT: Two minutes.

19 MS. SACKS: Ms. Cooper just said that the report is
20 relevant to the motion to dismiss. And I just would like to
21 point out, your Honor, that only one sentence of Harvard's
22 argument and its motion to dismiss in support of its 12(b)(6)
23 motion on page 13 purports to rely on the content of the
24 report. And it states: Indeed, the report confirms that the
25 committee did consider exceedingly carefully the arguments in

1 evidence she considered.

2 This is obviously a fact, a self-serving factual
3 contention that really doesn't belong in a 12(b)(6) motion to
4 dismiss, and it certainly isn't the kind of, it's one more
5 reason why the report doesn't belong in a public docket.

6 And in terms of the damage as -- and I'll be brief, as
7 set forth in the memo, this is a 1200-page report. The public
8 isn't going to necessarily be invested in reading all 1200
9 pages. They'll see the volume. They'll see the conclusion.
10 They'll see the imprimatur of Harvard, and it will be accepted.
11 The findings and conclusions. And certainly the name Harvard,
12 the brand, carries some weight. This -- it's a very poor
13 policy to put in this stage of the pleadings an employer's
14 investigatory report from public docket to essentially squelch
15 and make further public and further defame an employee in
16 Professor Gino's shoes.

17 THE COURT: All right, thank you.

18 MS. COOPER: Just with respect to citations and the
19 motion to dismiss, your Honor, because many of them were just
20 skipped, and I appreciate your Honor has our motion, but if I
21 may, very briefly, it is simply not the case that there's one
22 sentence that refers to the final report. Hundreds of pages of
23 the report are cited to and relied upon in our motion to
24 dismiss. And I won't go through it all unless your Honor would
25 like me to, but before you get to page 13, which is the

1 sentence that was just read, there is -- there are extensive
2 citations and writings on page 6. There are extensive writings
3 in the briefing on page 11, all referring to the final report
4 and reliance on it. As -- and I mean, I'm just looking at
5 highlighting in the document. And there are many paragraphs
6 and many sentences and hundreds of pages cited, not just one
7 conclusionary sentence, your Honor.

8 THE COURT: Understood, thank you.

9 MS. TOWNSEND: Your Honor, if I may just very briefly.
10 I neglected to mention, I think I would be remiss if I did not,
11 with respect to the Harvard Defendants' third-party privacy
12 arguments. We understand the names of the individuals that the
13 Harvard Defendants have proposed redacting are the names of
14 witnesses who were interviewed by the investigation team. And
15 I wanted to draw your Honor's attention to a paragraph in the
16 amended complaint which is paragraph 118. In that paragraph,
17 the plaintiff pleads that the investigation committee met with
18 and interviewed six of Professor Gino's collaborators and two
19 research assistants for the papers in question, and then
20 indicates and lists them by initials as well as what their
21 position was, research assistant or co-author -- presumably a
22 co-author on one of Professor Gino's papers. I did want to
23 bring that to your Honor's attention, because I did want to
24 flag that in some ways, to the extent that these are the
25 individuals that the Harvard Defendants have proposed redacting

1 the names of, they are easily surmisable from information
2 that's already in the public record, including copies of
3 Professor Gino's CV. But her articles themselves to which
4 these individuals or professors with these initials
5 co-authored, and so I wanted to flag that for your Honor and
6 neglected to do so earlier.

7 Thank you.

8 THE COURT: Thank you.

9 Let's pick a date for a hearing on the motions to
10 dismiss. How about the second week in April, the week of the
11 8th?

12 MR. PYLE: Your Honor, I expect to be on trial in the
13 Superior Court in Hampden County during that entire week. I
14 don't know if I'll be there all five days of the week, but I
15 would be nervous. It's a criminal case.

16 THE COURT: Okay.

17 MR. PYLE: Certainly any date in March would work for
18 the Data Colada defendants most likely.

19 THE COURT: Yes, I was just looking. I don't have a
20 date in March. Yeah, how about April 3rd? It's a Wednesday.

21 MR. PYLE: I apologize, your Honor, that's the date my
22 trial starts.

23 THE COURT: Gotcha. Okay.

24 What about April 25th?

25 MR. PYLE: I'm not usually this difficult, your Honor.

1 I do have a Rule 12 hearing already scheduled for April 25th.
2 Any other day that week should work. Except for Tuesday of
3 that week in the afternoon would certainly work and certainly
4 the 24th or the 26th.

5 THE COURT: All right. How about the afternoon of the
6 26th? It looks like my morning is full.

7 MR. PYLE: That's fine, your Honor, from our
8 perspective. Thank you.

9 MS. COOPER: That works for us, your Honor. Friday
10 the 26th you said, yes?

11 THE COURT: Yes. We'll make it 2:30 in the afternoon.

12 MS. SACKS: Yes.

13 THE COURT: Great. All right, thank you very much.

14 MS. COOPER: Thank you, your Honor.

15 MS. SACKS: Thank you, your Honor.

16 THE CLERK: All rise.

17 (The Honorable Court Exited.)

18 THE CLERK: Court's in recess.

19 (At 12:05 p.m., the Court Stood in Recess.)
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23
24
25

C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS)

I, Catherine L. Zelinski, certify that the foregoing
is a correct transcript from the record of proceedings taken
Friday, March 8, 2024, in the above-entitled matter to the best
of my skill and ability.

/s/ Catherine L. Zelinski

Catherine L. Zelinski, RPR, CRC
Official Court Reporter

4/1/2024